Supreme Court, U.S.
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No. 95-1221

In The

Supreme Court of the United States

October Term, 1995

JOSEPH B. HYMAN,

Petitioner,

v.

VIRGINIA DEPARTMENT OF TAXATION,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Supreme Court of Virginia properly refused to consider petitioner's post judgment claim for an attorney's fee under a state law common fund theory where (1) the state common fund rule is discretionary with the court and does not impress a lien upon or create an entitlement to a fee, and (2) where the undisputed facts establish that the fund was not under control of the court.

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STATEMENT OF THE CASE

The petitioner in this case, Joseph B. Hyman, Esquire, was not a party in any proceeding before the Virginia Supreme Court below. He was counsel to a group of 25 federal retirees seeking tax refunds in *Lewy v. Virginia Department of Taxation* – a companion suit to a case eventually decided in this Court. *See Harper v. Virginia Department of Taxation*, 509 U.S. ___, 113 S.Ct. 2520 (1993), *on remand, Harper v. Virginia Department of Taxation*, 250 Va. 184 (1995) (final judgment entered in favor of 130 retiree litigants) (hereafter *"Harper"*).

Upon the commencement of the *Harper* and *Lewy* suits, the Virginia General Assembly adopted legislation which had the effect of extending the statute of limitations and thus preserving the claims of *all* affected federal retirees seeking similar tax refunds (some 165,000 in number). *See* Va. Code § 58.1-1823(B) (1989). Later, the legislature enacted a statutory refund program which allowed these non-litigating retirees a choice: (1) to compromise their refund claims by accepting 75% of their tax refund amount, excluding interest, or (2) enter into an agreement with the Department of Taxation to "opt-out" of the settlement and be bound by the outcome of the *Harper* suit. Approximately 140,000 retirees took the settlement, and the remaining 14,250 chose to opt-out and be bound by the result in *Harper*. On September 15, 1995, the *Harper* case was decided in favor of the 130 retiree litigants in that case, and a like judgment was entered in the *Lewy* case. Pursuant to their agreements with the Department, the 14,000 plus opt-outs also became entitled to

payment of the full amount of their refunds, with interest. The total amount payable to these retirees exceeded $78 million.

Petitioner Hyman filed an injunction request with the Virginia Supreme Court on October 27, 1995, asking the Court to order the Department to deduct a 10% attorney's fee from the checks of the 14,000 plus opt-outs, thereby creating an attorney's fee of $7.8 million for distribution to counsel for the litigating retirees. The Virginia Department of Taxation, by counsel, filed pleadings in opposition to the request. The Supreme Court entered its order denying the requested injunction on November 2, 1995. On November 9, 1995, the Department mailed checks to all 155 litigating retirees, and to all 14,000 plus nonlitigating retirees. The Commonwealth's refund obligation under the Court's judgment has been discharged and there are no funds earmarked for litigants or opt-outs from which petitioner could draw a fee. In any event, he is not entitled to such fee as a matter of state law, and there is no viable federal issue which warrants review by this Court.

REASONS FOR DENYING THE WRIT

1. The State Law Common Fund Doctrine Does Not Create An Entitlement To A Fee.

The common fund doctrine in Virginia, as recognized by the Virginia Supreme Court, does not create an entitlement to a fee. It does not impress a lien upon any funds or create a cause of action for the recovery of a fee. It merely defines "the power of a court to require one party

to contribute to the fees of the counsel of another party." *McCormick v. Elsea*, 107 Va. 472, 475 (1907). It is "a power capable of great abuse and one which should be exercised with the most jealous caution and regard to the right of the litigants." *Stoneburner v. Motley*, 95 Va. 784, 790 (1898). On appeal of any such fee determination, the standard of review is whether "the trial court abused its discretion in allowing the fee or the amount thereof." *Realty Corp. v. Looney*, 201 Va. 432, 435, 11 S.E.2d 410 (1959).

Virginia law has confined the common fund doctrine narrowly, to cases involving decedents estates, *duPont v. Shackleford*, 235 Va. 588, 369 S.E.2d 673 (1988); judicial sales of real estate, *Austin v. Dobbins*, 219 Va. 930, 252 S.E.2d 588 (1979); *Realty Corp. v. Looney, supra*; stockholders suits, *Starring v. Kemp*, 167 Va. 429, 124 S.E. 174 (1936); and like cases. Common fund fees have *never* been granted in a Virginia tax refund case, however, and it would be adverse to sound public policy to encourage such a result. *See e.g.*, § 58.1-1829 (prohibiting any assessment of costs against the Commonwealth in a tax refund action).

Further, the common fund doctrine is applicable only to funds within the control of the court. In *Oklahoma Tax Comm'n v. Ricks*, 885 P.2d 1336 (Okla. 1994), a case nearly identical to Hyman's claim here, the Supreme Court of Oklahoma denied a common fund claim filed by the attorney who recovered a favorable judgment for federal retirees in that state. As the Court stated, "[t]he majority rule in state and federal courts is that, before a money pool may be subjected to a common-fund attorney's fee assessment, the created or preserved fund must be brought under the direct supervision and control of the

court." *Id.* at 1339-40. Here, because Treasury funds were used to provide refunds to Virginia's federal retirees, they were not under the control of any court. The Oklahoma court emphasized this same point in *Ricks* in holding the common fund doctrine inapplicable:

> Because a state treasury is in no sense under the custody or control of the [trial] court, any action by the court which would precipitate a flow of monies from the state treasury cannot be deemed one to "create, preserve or protect" a fund. Where a final order merely increases the taxing authority's liability, no segregable fund results from which attorney's fees may be awarded.

Ricks, 885 P.2d at 1340-41. This holding is persuasive here.

There is no indication in Virginia case law which suggests that the Commonwealth has joined the minority of states which have "dispense[d] with or relax[ed] the otherwise rigid requirement of present court control." *Id.* at 1341. *See Patterson v. Trust Co.*, 156 Va. 763, 774, 158 S.E. 168 (1931) (Court may award fees out of fund "which is within the custody or control of the Court"). *Stovall v. Hardy*, 1 Va. Dec. 342 (1879), involved proceeds from a judicial sale of real property. *duPont v. Shackelford*, 235 Va. 588, 369 S.E.2d 673 (1988), in which the Supreme Court recognized the continued existence of the common fund doctrine (although not applying it to a case where all parties were represented by counsel), involved an estate.[1]

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[1] *See also Austin v. Dobbins*, 219 Va. 930, 252 S.E.2d 588 (1979) (partition suit; fee ordered from proceeds of judicial sale of real estate); *Realty Corp. v. Looney*, 201 Va. 432, 11 S.E.2d 410

Clearly, these cases all involved tangible and segregable value over which the court exercised some form of direct control. The instant case simply does not meet this requirement as a matter of Virginia law.

Finally, it must be emphasized that it was not solely counsels' efforts which created a right of recovery for the non-litigating retirees. The operative action which paved the way for recovery by the retirees was taken by the Virginia General Assembly in a Special Session in April 1989, called immediately after this Court's decision in *Davis v. Michigan Dep't. of Treasury*, 489 U.S. 803 (1989). In that Special Session, the General Assembly adopted an amendment *extending the statute of limitations* for the filing of retiree claims. *See* § 58.1-1823(B) (1989). This amendment was adopted *long* before any of the refund suits reached judgment, and it alone preserved a right of recovery for literally tens of thousands of retirees who otherwise would have been time barred. In sum, Hyman's common fund claim was properly refused by the Virginia courts as a matter of Virginia state law, and there is no reason for this Court to review that state law question.

(1959) (partition sale of real estate; fee paid from proceeds of judicial sale); *White v. Thompson*, 186 Va. 567, 42 S.E.2d 868 (1947) (creditors' suit; fee paid from proceeds of judicial sale of lands); *Starring v. Kemp*, 167 Va. 429, 124 S.E. 174 (1936) (stockholders' suit; fee ordered from dividends paid by company); *Dunlop v. McGehee*, 139 Va. 643, 124 S.E. 199 (1924) (dissolution of partnership; fee ordered from assets); *McCormick v. Elsea*, 107 Va. 472 (1907) (decedent's estate; fee ordered from assets of estate); *Stoneburner v. Motley*, 95 Va. 784 (1898) (creditors' suit; fee ordered as part of fund distribution by court).

2. Petitioner Has No Constitutional Right To A Common Fund Attorney's Fee.

In order to state a claim for deprivation of property without due process, a party must first establish that he was deprived of a *cognizable property interest*. As this Court has noted on many occasions, the Constitution does not create property interests. Rather, they are created and defined by existing rules and understandings under state law which support an *enforceable claim of entitlement*. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Leis v. Flynt*, 439 U.S. 438, 441-42 (1979).

In *Leis v. Flynt, supra*, this Court made clear that a *unilateral* expectation on the part of a would-be property holder cannot create an entitlement. In *Leis*, an out-of-state attorney sought admission *pro hac vice* in an Ohio trial court to represent a criminal defendant. The trial court exercised its discretion to deny the request, and the attorney sued, claiming he had a property interest in practicing his profession in the Ohio courts. The Court disagreed. "A claim of entitlement under state law, to be enforceable, must be derived from a statute or legal rule or a mutually explicit understanding." *Id.* at 442. Where the claim is premised on the *discretion* of the granting authority, there is no "entitlement" and, thus, no cognizable property interest protected by the Constitution. That is the case here.

There is no statute or rule of law which *entitles* petitioner to any fees under the common fund doctrine. He has alleged no lien for fees; no representation agreement; no promise from the retirees; nothing which gives him an enforceable claim of *entitlement*. As noted above, the

ordering of fees under the common fund doctrine in Virginia is within the broad discretion of the Court. Thus, the law provides nothing more than a unilateral expectation that an attorney may receive a fee. This does not create a cognizable property interest under the Federal Constitution.

Having failed to show a property interest in the common fund fee itself, petitioner's fallback position is that he has a property interest in his "cause of action" for attorneys fees. This is simply wrong. "The essential elements of a good cause of action, whether based on an alleged breach of contract or on a tortious act, are a legal obligation of a defendant to the plaintiff, a violation or breach of that right or duty, and a consequential injury or damage to the plaintiff." *Caudill v. Wise Rambler*, 210 Va. 11, 13, 168 S.E. 2d 257, 259 (1969). Here, Hyman cannot establish that the state has a "legal obligation" under any theory to award him a fee from the refund monies paid from the general Treasury. As such, he has no cause of action as a matter of law.

The cases cited by petitioner to support his cause of action property interest theory are completely distinguishable, as all of them involved a legal right or obligation presently enforceable under state law. *See Tulsa Professional Collection Services v. Pope*, 485 U.S. 478 (1988) (hospital's claim against estate for medical bills incurred in treating decedent's final illness); *United States v. Security Indus. Bank*, 459 U.S. 70 (1972) (money lenders obtained perfected liens on debtors' household furnishings and appliances); *Mullane v. Central Hanover Bank*, 339 U.S. 306 (1950) (right of beneficiaries of trust to proceed against trustee for negligence or breach of trust). Petitioner's

unilateral expectancy of an attorneys' fee is nothing like the state law property interests protected in these cases. He has no legally enforceable right to a fee, and thus cannot state such a claim under the Federal Constitution.

Finally, petitioner contends that he has a First Amendment right to "speak out" against state policy, and the refusal to grant him a common fund attorney's fee violates his right to do so. This argument is so lacking in merit, and so unsupported by logic or precedent, that no formal response is necessary.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the Supreme Court of Virginia should be denied.

Respectfully submitted,

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